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IN THE

# Supreme Court of the United States

October Term, 1937.

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No. 37.

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DAVID A. WRIGHT, *Petitioner,*

v.

THE UNITED STATES.

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## PETITIONER'S BRIEF FOR USE UPON ARGUMENT OF CASE.

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### OPINION BELOW.

The Court of Claims rendered no opinion (R. 6).

### JURISDICTION.

The Court of Claims entered judgment dismissing the petition February 8, 1937 (R. 6). This Court granted Writ of Certiorari June 1, 1937 (R. 6). The jurisdiction of this Court is invoked under section 3(b) of the Act of February 13, 1925.

### STATUTES INVOLVED.

Section 1, Article I, of the Constitution:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Clause 2, Section 7, Article I, of the Constitution:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. *If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law*".

## STATEMENT OF FACTS.

A Bill of Congress (74th Congress, 1st session), which originated in the Senate (R. 3) and was designated as S. 713, and which had duly passed both Houses of Congress (R. 1), conferred jurisdiction on the Court of Claims to reinstate, reopen, rehear, and readjudicate petitioner's claim against the United States (R. 3).

This Bill was presented by Congress to the President on April 24, 1936 (R. 1).

Wednesday, May 6, 1936, was the tenth day, Sundays excepted, after the presentation of the Bill to the President. On Monday, May 4, 1936, at 3:25 p.m., the Senate, under its constitutional right so to do (Cl. 4, sec. 5, art. I), took a recess until noon, Thursday, May 7, 1936 (R. 1); the House of Representatives being in session during said recess of the Senate (R. 1).

During such recess of the Senate the President, by a messenger, delivered said Bill, and his objections thereto in writing, to the Secretary of the Senate; and the Secretary of the Senate, on May 7, 1936, delivered to the Senate the following letter with which he transmitted the papers therein mentioned:

UNITED STATES SENATE,
Washington, May 7, 1936.

HON. JOHN N. GARNER,
President of the Senate.

My Dear Mr. President: On Friday, April 24, 1936, the Committee on Enrolled Bills of the Senate presented to the President of the United States the enrolled bills (S. 713) granting jurisdiction of the Court of Claims to hear the case of David A. Wright, and (S. 929) for the relief of the Southern Products Co., which had passed both Houses of Congress and been signed by the Speaker of the House of Representatives and the President of the Senate.

The Senate, at 3:25 p. m. Monday, May 4, 1936, took a recess until 12 noon on Thursday, May 7, 1936.

During the interim the President of the United States sent by messenger two messages addressed to the Senate, each dated May 5, 1936, giving his reasons for not approving, respectively, Senate bill 713 and Senate bill 929. The Senate not being in session on the last day which the President had for the return of these bills under the provisions of the Constitution of the United States, in order to protect the interests of the Senate so that it might have the opportunity to reconsider the bills, I accepted the messages, and I now present to you the President's veto messages, with the accompanying papers, for disposition by the Senate.

Sincerely yours,

EDWIN A. HALSEY,
*Secretary of the Senate.*

On the same day, May 7, 1936, the President of the Senate laid before the Senate the Secretary's aforesaid letter and the said Bill (S. 713) and the President's objections thereto in writing, which objections were read and, with the said Bill, referred to the Senate Committee on Claims (R. 3).

Under authority of said Act of Congress (S. 713), petitioner, on September 14, 1936, filed in the Court of Claims his petition to reinstate, reopen, rehear and readjudicate his said claim (R. 1); on October 15, 1936, respondent filed in said Court its opposition to said petition (R. 4), and on February 8, 1937, the Court of Claims entered its judgment dismissing the petition, without opinion (R. 6).

## SPECIFICATIONS OF ERROR.

The Court of Claims erred:

1. In failing to hold that delivery to the Secretary of the Senate of the unsigned Bill and the President's objections thereto was not a return of said Bill and objections to the Senate, the House in which the Bill originated.

2. In failing to hold that the President not having returned the Bill with his objections thereto to the Senate in session within ten days (Sundays excepted) and the President not having been prevented from returning the Bill by an adjournment of "the Congress", said Bill became law without the President's approval and signature.

3. In failing to hold that it is the adjournment of "the Congress" and not of one of the Houses thereof which must prevent the return of a Bill by the President in order that said Bill, not signed and approved by him, shall not become a law.

4. In failing to hold that said Bill, S. 713, is a law of the United States.

5. In dismissing the petition.

## ARGUMENT.

### I.

### Delivery of the Bill and Objections Thereto to the Secretary of the Senate is Not a Return Thereof to the Senate as Required by the Constitution.

The constitutional requirement is that the President must return the Bill and his objections thereto to the House in which the Bill "shall have originated". The Bill originated in the Senate and was, therefore, returnable to the Senate.

But the Bill was not returned to the Senate but was delivered, with the objections, to the Secretary of the Senate. This Court has explicitly held that the return required by Clause 2, Section 7, Article I, of the Constitution must be to the House in which the Bill originated "in session" *(The Pocket Veto Case,* 279 U. S. 655). Accordingly, it was the constitutional requirement that this Bill, S. 713, be returned to the Senate "in session".

An examination of the Journals of the Senate and House of Representatives from the First to the Seventy-Second Congress (President Washington to President Hoover, 1789-1933), both inclusive, discloses that, of the 638 Acts of Congress vetoed during that period, there is not a single instance of the return of a bill to either House being effected by the delivery thereof to the Secretary of the Senate or the Clerk of the House of Representatives. There is only one instance where an attempt was made to do so: On May 19, 1888, President Cleveland, finding the Senate in recess, attempted to return S. 1064 (50 Cong. 1 sess.) to the Senate by tendering the bill, and his objections thereto, to the Secretary of the Senate and then to the President of the Senate, but both of these officers refused to receive the same "claiming that the return of said bill and the delivery of said message could only properly be made to the Senate when in actual session" (President Cleveland's message, Senate Journal, p. 856, 50 Cong. 1 sess.).

These journals show that during the above mentioned period the uniform method of procedure was for the President's secretary *to appear before the Senate or House of Representatives in open session and announce the message from the President.*

An examination of the Journals of both houses of Congress during the Seventy-third and Seventy-fourth Congresses (1933-1936) discloses that the above practice prevailed with respect to the 103 acts of Congress vetoed during that period, except in the four following instances, involving four private relief bills, all originating in the Senate, in which the President attempted to return the bills to the Senate by a delivery thereof to the Secretary of the Senate, namely: *S. 1724,* 73 Cong., 2 sess. (Senate Journal 199), which was reintroduced in the 74 Cong., 2 sess., as S. 427 and passed and approved by the President (Senate Journal 309); *S. 694,* 74 Cong., 1 sess. (Senate Journal 490), which forms the basis of a pending suit in the Court of Claims; *S. 713,* 74 Cong., 2 sess. (Senate Journal 271), which forms the basis of this suit; and *S. 929,* 74 Cong., 2 sess. (Senate Journal 271).

## II.

## The Congress of the United States in Both Houses Thereof and Cannot Be One House Thereof.

That the Congress of the United States is composed of both the Senate and the House of Representatives and cannot consist of one of them is so obvious and settled as not to be open to debate.

In the very first sentence of the Constitution (Sec. 1, Article I), it is provided that the Congress of the United States "shall consist of a Senate and House of Representatives".

The sources of origin of the Federal provision respecting the veto power of the Executive are both interesting and instructive. When the Federal Constitution was drafted in

1787 twelve of the colonies were operating as independent states under constitutions adopted during or after the year in which Independence was declared: Delaware (1776), Georgia (1776), Maryland (1776), Massachusetts (1780), New Hampshire (1784), New Jersey (1776), New York (1777), North Carolina (1776), Pennsylvania (1776), South Carolina (1778), Vermont (1786), and Virginia (1776).

Only three of these constitutions gave the Executive any power whatever over legislation, those of Vermont, New York and Massachusetts.

By the Constitution of Vermont, bills originating in the Assembly (which was a single legislative body) were required to be submitted to the Governor *and* Council "for revision and concurrence or proposal of amendments". If the amendments proposed by the Governor and Council were not adopted by the Assembly the Governor and Council could suspend the passing of such bill until the next session of the Assembly.

The Constitution of New York of 1777 contained the following provision:

> "III. And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed: Be it ordained, that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time, when the legislature shall be convened; for which, nevertheless, they shall not receive any salary or consideration, under any pretence whatever. And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revisal and consideration; and if, upon such revision and consideration, it should appear improper to the said council, or a majority of them, that the said bill should become a law of this State, that they return the same, together with their objections thereto in writing, to the

senate or house of assembly (in which soever the same shall have originated) who shall enter the objection sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, two-thirds of the said senate or house of assembly shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law.

"And in order to prevent any unnecessary delays, be it further ordained, that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days."

The Constitution of Massachusetts of 1780 contained the following provision:

"No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichsoever the same shall have originated; who shall enter the objections sent down by the governor, at large, on their records, and proceed to reconsider the said bill or resolve. But if after such reconsideration, two-thirds of the said senate or house of representatives, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two-thirds of the members present, shall have the force of law: but in all such cases, the votes of both houses shall be determined by yeas and nays; and

the names of the persons voting for, or against, the said bill or resolve, shall be entered upon the public records of the commonwealth.

"And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of a law."

By a comparison of the Federal provision with the New York and Massachusetts provisions it is not difficult to perceive that every idea contained in the former was derived from the latter, and that the form and language of the Federal provision closely parallels that of the New York Constitution of 1777. So close was this parallel that the preliminary draft of the Federal provision, as reported by the Committee on Detail of the Convention on August 6, 1787, did not contain the words "the Congress" but the words "the Legislature", used precisely in the same sense as those words were used in the New York Constitution. The sense in which the words "the Legislature" were used in the New York Constitution is demonstrated by the provision of the New York Constitution itself, wherein it was provided that the legislative power should be vested in "two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York; who together shall form the Legislature". In order to conform to the style employed to designate the Federal legislative body, in the final draft of the Federal provision, reported on September 12, 1787, by the Committee on Style, the words "the Congress" were substituted for the words "the Legislature". (*Thorpe,* "The Federal and State Constitutions", 1909, pp. 562, 785, 1686, 1888, 1893, 2453, 2594, 2623, 2628, 2787, 3081, 3248, 3762, 3812; *Charles Warren,* "The Making of the Constitution", pp. 384, 686; and see *U. S.* v. *Weil,* 29 Ct. Cl. 523, 538).

In the expression "the Congress by their adjournment prevent" the modifying possessive adjective and the verb

are both in the plural, indicating careful diction and a clear intent that "the Congress" should be understood in the plural sense as denoting the concurrent adjournment of the two Houses of the National Legislature, just as the words "the Legislature . . . , by their adjournment", as used in the New York Constitution of 1777, meant the adjournment of the whole law making power of the State.

This is further emphasized by the fact that while the "return" of the bill was to be to the particular House in which it originated the "adjournment" referred to in the same provision is not the adjournment of a particular House but the adjournment of "the Congress"—the whole Legislative power of the United States.

## III.

### Only When THE CONGRESS, by Their Adjournment, Prevent a Return Does a Bill Which the President Has Not Approved and Signed Fail to Become a Law.

It may well be questioned whether the recess of the Senate prevented the return of the Bill in this case. The Bill was presented to the President on Friday, April 24, 1936; the Senate recessed at 3:25 p. m. on Monday, May 4. This bill, therefore, had been in the President's hands 8 full week days of 24 hours each, and 2 Sundays, when the Senate recessed on Monday, May 4, assuming that the Bill was presented to him at about the same time of day on April 24th that the Senate recessed on May 4th. This was a longer time than the average time that all Presidents have held such bills, as shown by the following statement derived from an examination of the time of presentation of all vetoed bills and the dates of the veto messages, as disclosed by the Journals of the Senate and House of Representatives:

| *President* | *Bills Presented* | *Bills Vetoed** | *Average days held* |
|---|---|---|---|
| Washington | 409 | 2 | 7 |
| Madison | 906 | 5 | 4.9 |
| Monroe | 1,039 | 1 | 0 |
| Jackson | 1,692 | 5 | 2.8 |
| Tyler | 813 | 6 | 5.1 |
| Polk | 752 | 2 | 4 |
| Pierce | 977 | 9 | 5.9 |
| Buchanan | 689 | 4 | 5.5 |
| Lincoln | 1,042 | 2 | 5.5 |
| Johnson | 1,493 | 21 | 7.7 |
| Grant | 3,307 | 43 | 6 |
| Hayes | 1,408 | 12 | 2.3 |
| Arthur | 1,741 | 4 | 7.5 |
| Cleveland I | 3,695 | 304 | 8.99 |
| B. Harrison | 3,053 | 19 | 7 |
| Cleveland II | 1,821 | 42 | 8.4 |
| McKinley | 3,455 | 6 | 8 |
| T. Roosevelt | 14,427 | 42 | 6.1 |
| Taft | 1,564 | 30 | 4.2 |
| Wilson | 2,524 | 33 | 7 |
| Harding | 937 | 5 | 7 |
| Coolidge | 4,186 | 20 | 6.3 |
| Hoover | 2,399 | 21 | 7.5 |
| F. D. Roosevelt | 2,918 | 103 | 7.5 |
| Total | | 741 | Aver. 7.642 |

*Presidents John Adams, Jefferson, J. Q. Adams and Taylor and Fillmore vetoed no bills. Congress was not in session at any time during the incumbency of President W. H. Harrison or President Garfield.

Assuming, however, that the President was prevented by the adjournment of the Senate from returning the Bill and his objections to the Senate "in session", the Bill became a law without the President's approval and signature, because there was no adjournment of the "the Congress" which prevented the return, and there is no provision in the Constitution that a Bill, disapproved by the President,

shall not become a law when he is prevented from making a return to the body in which it originated by reason of a recess or adjournment of that body.

The language of Clause 2, Sec. 7, Article I, is unambiguous. The President must be prevented from returning the Bill by an adjournment of "the Congress." The framers of the Constitution defined the term "the Congress" and provided that it should "consist of a Senate and House of Representatives." Furthermore, the framers anticipated not only adjournments of "the Congress" but also adjournments of either House thereof and, therefore, carefully provided (Clause 4, Sec. 5, Article I) that "neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days."

The framers of the Constitution, many of whom (39 out of the 55) were, or had been, members of the Continental Congress, knew that legislative bodies frequently take a temporary recess for a day or two. The Constitution was framed in 1787, and in that year (on September 28) submitted by the Congress to the Legislatures of the several States. During the previous year—1786—, for example, the Continental Congress was in session from January 2 to November 13, a period of 271 days, excluding Sundays, and, during that period, they were in recess, of their own motion, 2 Mondays, 2 Tuesdays, 2 Wednesdays, 1 Thursday, 7 Fridays, and 41 Saturdays; 39 of said recesses being for 1 day, 6 for 2 days, and 1 for 4 days. And in 1787, the Continental Congress, from the time of assembly on January 17, to August 6 (when it could no longer get a quorum to do business until a few days before September 28, the day on which the Constitution was submitted to the Legislatures of the States), a period of 173 days, excluding Sundays, was in recess, of its own motion, 1 Monday, 1 Tuesday, 2 Wednesdays, 4 Fridays, and 16 Saturdays; 12 of these recesses being for 1 day, and 6 for 2 days each. Based upon this experience they provided in the Constitution that each House, on its own motion, might adjourn for one, two, or

even three days at a time, but did not provide that where such recess prevented the return of a bill it should die.

Knowing, then, that either one of the Houses of Congress could adjourn for one, two or three days at a time, during a session of Congress, the framers, nevertheless, provided that only when "the Congress by *their* adjournment" prevented the return of a Bill should it fail to become a law; and nowhere did they provide that when one House of the Congress, by *its* adjournment, prevented the return of a Bill, should it fail to become a law.

## IV.

### The Veto Power Being in Derogation of Legislative Power Can Be Exercised Only When and as Expressly Authorized.

While the legislative power of Congress is limited to that expressly, or by necessary implication, conferred by the Constitution, nevertheless, within that sphere, by the express language of the Constitution, the Congress possesses "all legislative power" (Sec. 1, Art. I); therefore, any grant of legislative power to the Executive is in derogation of the legislative power of Congress, and must be found to exist in the express language of the Constitution.

The power of the President, with respect to legislation, is advisory only. He is not invested with the discretionary power to kill a single bill; but he is clothed with power to deprive the Congress of the right to exercise legislative power in respect to any bill unless a larger number are in favor thereof than is necessary in the ordinary exercise of legislative power. *While, therefore, not possessing the power to legislate, the President, nevertheless, possesses the power to restrict the exercise by Congress of the power to legislate.*

This *qualified veto* he is authorized to exercise with respect to *every bill* presented to him. But only in a *single instance* does the Constitution provide that his power shall

extend to imposing an *absolute veto* upon any act of Congress, and that is the one case expressly stated in the Constitution, namely: Where "the Congress by their adjournment prevent" the return of the bill.

The Constitution provides (Clause 2, section 7, Article I) that every Act of Congress shall, before it becomes a law, be presented to the President. In view of the constitutional provision (Section 1, Article I) that all legislative powers granted by the Constitution are vested in the Congress, it must be inferred that any bill which has passed Congress and been presented to the President is a law, *unless it affirmatively appears* that something subsequent to such presentation, within the express provisions of the Constitution, has intervened to prevent its becoming a law; and the only thing, under the express language, that can so happen, is the open and notorious adjournment of the Congress.

The veto power, being in derogation of the legislative power, the extent and manner of its exercise must be controlled by the express language of the Constitution. (*Lukens* v. *Nye*, 105 P. 593, 156 Cal. 498; *Stong* v. *People*, 220 P. 999, 74 Colo. 283; *Elmen* v. *St. Bd. of Equalization and Assessment*, (Neb.) 231 N. W., 772; *Fulmore* v. *Lane*, 140 S. W., 405, 411, 1082, 104 Tex. 499; *Hartness* v. *Black*, 114 A. 44, 95 Vt. 190; *May* v. *Topping*, 64 S. E. 848, 65 W. Va. 656; *Wood* v. *State Administrative Board*, 238 N. W., 16, 255 Mich., 220).

In *Wood* v. *State Administrative Board, supra*, the court discussed the veto power generally, saying:

> "The veto power is a legislative function, although it is not affirmative and creative, but is strictly negative and destructive. It cannot be exercised by the executive except through constitutional grant. By Constitution, article 4, sec. 1, in harmony with American political theory, the state government is divided into the three historical departments, the legislative, executive and judicial, and by section 2 it is declared that: 'No person belonging to one department shall exercise the powers properly belonging to another, ex-

cept in the cases expressly provided in this constitution'. This historical and constitutional division of the powers of government forbids the extension, otherwise than by explicit language or necessary implication, of the powers of one department to another. The language of section 37 must be read with all intendments against enlargement beyond its plain words. And if it were ambiguous, the doubt should be resolved in favor of the traditional separation of governmental powers and the restricted nature of the veto."

In *Fulmore* v. *Lane, supra,* the Court said of the veto power:

> "The veto power of the executive under our system of government is not inherent in such officer as a legislative function, but is a power confided in him by the supreme authority of the state; and in exercising this function, while he is not confined to rules of strict construction, he nevertheless must look to the Constitution for the authority to exercise such power."

In *May* v. *Topping, supra,* the court had for consideration a case where an appropriation bill, embracing distinct items, was presented to the Governor on February 26, 1909, and the Legislature adjourned immediately thereafter on the same day; the Constitution providing that if the Governor disapproved any item he should communicate his disapproval, with his reasons therefor, to the House in which the bill originated, and that all items approved should have the force of law but all items so disapproved should be void unless repassed by a majority vote of each House. After the adjournment, the Governor marked out with red ink (among other items) an item in favor of Mrs. May, the plaintiff, and endorsed on the bill his approval of all other items. The Court held that the items marked out in red ink were not disapproved, because, under the constitutional provision, no item could be disapproved unless the disapproval was returned to the Legislature before it adjourned no matter how soon the Legislature adjourned after pre-

senting the bill to the Governor. In answer to the argument that the Legislature could thus deprive the Governor of his veto power over such bills the court said, among other things, that the court could not amend the Constitution by construction; that "where that instrument is clear in its terms and of plain interpretation to any ordinary and reasonable mind, there is no room for construction, and it would be mischievous and unlawful to assume it"; that "it was surely believed that the legislative and executive branches, in the interests of the masses they represent, would treat each other fairly in such cases"; and that if the Governor wanted to insist upon the exercise of his veto power; "He had full power to convene the body the next day in extraordinary session, limiting that session to the consideration of appropriations only".

The only possible way in which it can be held that S. 713 failed to become a law is to write into the Constitution something which is not there and to do so notwithstanding that the framers knew and provided for three day adjournments of either House and yet did not provide that a Bill should not become a law when the President was prevented from returning it by the adjournment of the House in which it originated. To hold that S. 713 did not become a law means changing the words "unless the Congress by their adjournment prevent its return" (Clause 2, Sec. 7, Article I) to read "unless the Congress or the House in which it shall have originated by their adjournment prevent its return." This, we respectfully submit, cannot possibly be done without absolutely destroying every fundamental concept of constitutional interpretation.

In *Lake County* v. *Rollins*, 130 U. S. 662, involving construction of a provision of the Constitution of Colorado, counsel offered interpolations of the Provision. This Court said (p. 670):

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Con-

stitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

In the case of *United States* v. *Sprague,* 282 U. S. 716, this Court stated (p. 731):

> "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."

## V.

**The Established Practice Has Been that a Bill Not Approved and Signed by the President Becomes a Law Notwithstanding that a Recess or Adjournment of the House in Which it Originated Prevented Its Return.**

In *The Pocket Veto Case,* 279 U. S. 655, this Court held (p. 689) that:

> "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."

and the Court discussed the construction placed upon the constitutional provision in reference to so-called "pocket vetoes".

Senate Bill 713 was not returned by the President to the Senate in the time and manner prescribed by the Constitution. *In contemplation of the Constitution that Bill has*

*never been returned to the Senate. At the expiration of the constitutional 10 days the status of S. 713 became fixed by the Constitution and no subsequent action by either the President or Congress could change that status.* The Bill either became a law by reason of the President's failure to constitutionally return it or it died in his hands as a so-called "pocket veto", on the theory that the recess or adjournment of the Senate alone prevented its return. Not only does the language of the Constitution forbid the latter conclusion, but legislative and executive interpretation throughout our entire history is opposed to it.

From the First Congress in 1789 to the end of the 74th Congress in 1936 there were a total of 601 so-called "pocket vetoes", 117 of which occurred during the first term of President F. D. Roosevelt (House Document No. 493, 70th Cong., 2nd Sess. discussed in *"Pocket Veto"* case *supra;* "Record of Veto Messages", 51st to 74th Cong., Government Printing Office, 1936; House and Senate Journals 1st to 74th Congresses).

As shown by the Journals of the Senate and House of Representatives, of these 601 so-called "pocket vetoes", 5 followed adjournments of Congress for the Christmas Holidays; 3 followed adjournments within the session during the administration of President Johnson; 247 followed *sine die* session adjournments; and 354 followed *sine die* adjournments of Congress.

In all instances, except where a Congress adjourned by reason of the expiration of its term, adjournments were pursuant to *resolutions concurred in by both Houses;* and in *no single instance* was there a "pocket veto" due to the recess or adjournment of one House alone within 10 days, Sundays excepted, of the presentation of the bill.

On the contrary, we cite the following instances where bills have been treated as laws without the President's approval when the House in which the bills originated was in recess or adjournment on the 10th day after presentation. The Presidents and Congress regarded the status of these bills as fixed by the Constitution into laws, and they were

published and enforced as laws, just as S. 713 became fixed into a law by the Constitution upon the failure of the President to make a constitutional return thereof with his objections.

(a) In the first session of the 54th Congress, three Senate bills, to wit: Nos. 1, 138 and 142, were presented to President Cleveland on January 28, 1896 (Senate Journal, 100). *On the 10th day thereafter,* namely, February 8, 1896, *the Senate was in recess* (Senate Journal 120). On February 10, 1896, President Cleveland's secretary, Mr. Pruden, addressed the presiding officer of the Senate and said, among other things, that these three bills "having been presented to the President of the United States January 28, 1896, and not having been returned by him to the House of Congress in which they originated within the ten days prescribed by the Constitution *have become laws without his approval*" (Senate Journal, 121).

(b) In the second session of the 54th Congress, Senate Bill 724 was presented to President Cleveland on January 5, 1897 (Senate Journal, 41). *On the 10th day thereafter,* namely, January 16, 1897, *the Senate was in recess* (Senate Journal, 54). On January 18, 1897, President Cleveland's secretary, Mr. Pruden, addressed the presiding officer of the Senate and said, among other things, that this bill "having been presented to the President on the 5th instant, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution *has become a law without his approval*" (Senate Journal, 57).

(c) In the third session of the 66th Congress, Senate Joint Resolution 191 was presented to President Wilson on December 17, 1920 (Senate Journal, 26). *On the 10th day thereafter,* namely on December 29, 1920, *the Senate was in recess* (Senate Journal, 34). On January 7, 1921, President Wilson delivered a message to the Senate, by Mr. Sharkey, his secretary, saying, among other things, that this Joint Resolution "having been presented to me on December 17,

1920, and not having been approved by me or returned to the Senate within the 10 days prescribed by the Constitution, *has become a law without my approval''* (Senate Journal, 46).

(d) At the second session of the 53rd Congress House Bill 2582 was presented to President Cleveland on August 6, 1894. *On the 10th day* thereafter, August 17, 1894, *the House was in recess* (House Journal, 574). On August 20, 1894 (House Journal, 575), a message from President Cleveland announced that this bill ''having been presented to the President on the 6th instant, *had become a law without his approval''*.

(e) At the same session of Congress House Bill 6518 was presented to President Cleveland on August 7, 1894. *On the 10th day thereafter,* August 18, 1894, *the House was in recess* (House Journal, 574). On August 20, 1894, a message from President Cleveland announced that this bill ''having been presented to the President on the 7th instant (August 7, 1894) *had become a law without his approval''*.

(f) At the first session of the 54th Congress House Bills 3607 and 4526 were presented to President Cleveland on May 19, 1896. *On the 10th day thereafter,* May 30, 1896, *the House was in recess* (House Journal, 556). On June 3, 1896, a message from President Cleveland announced that these Bills ''were presented to the President May 19, 1896, and not having been returned by him to the House of Congress in which they originated within the ten days prescribed by the Constitution *have become laws without his approval''* (House Journal, 569).

(g) At the second session of the 54th Congress House Bill 7777 was presented to President Cleveland on January 12, 1897. *On the 10th day thereafter,* January 23, 1897, *the House was in recess* (House Journal, 104). On January 28, 1897 (House Journal, 122), a message from President Cleveland announced that this Bill ''having been presented to the President on January 12, 1897, and not having been returned by him to the House of Congress in which it origin-

ated within the time prescribed by the Constitution *has become a law without his approval''*.

The legislative history of the 10 bills above cited is legally and constitutionally indentical with the legislative history of Senate-Bill 713, and it is apparent that if those bills became laws Senate Bill 713 also became a law. But we do not say that the 10 bills cited above became laws because the Presidents thought they became laws or Congress treated them as laws any more than it can be said that Senate Bill 713 did not become a law because the President thought he had prevented it from becoming a law. Upon the failure of the Presidents to return all these bills in the constitutional period their status became fixed by the Constitution (*i. e.*, they were laws or not laws) and nothing the Presidents or Congress could do could change that status.

We cite the instances of the ten bills to show merely that Presidents Cleveland and Wilson and the Congresses to which the bills were returned believed that when a bill was not returned in the time prescribed by the Constitution it became a law although the House in which it originated was not in session on the 10th day, the Congress not having adjourned. And these executive and legislative precedents, coupled with the fact that not a single instance is found throughout our history of a so-called "pocket veto" due to the adjournment of one House of Congress alone, is such clear proof of long executive and legislative interpretation as to be strongly persuasive of the meaning of the constitutional provision.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed.

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IN THE

# Supreme Court of the United States

October Term, 1937.

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No. 37.

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v.

THE UNITED STATES.

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

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## REPLY TO BRIEF OF UNITED STATES.

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## REPLY TO BRIEF OF UNITED STATES.

Respondent contends that the word "their", as used in the expression "unless the Congress by their adjournment prevent", may refer to the Senate *or* the House of Representatives, in the alternative, and that, therefore, the adjournment of the Senate alone having prevented the return of the bill, in a constitutional sense, it did not become a law.

An examination of the Constitution demonstrates that respondent's contention cannot be sustained, because (1) the context is always clear where the Constitution speaks of the two Houses separately; (2) wherever the word "Congress" is used in the Constitution the context makes it clear that reference is to both Houses and not to either one of them separately; (3) the use of the singular or plural in referring to the Senate or House of Representatives is exclusively one of style and never one of substance; and (4)

where the plural is used in referring to Congress, the two Houses of Congress are meant and not the members of either House.

### (1) The Context is Always Clear When the Constitution Speaks of the Two Houses Separately.

In most instances the Senate and the House of Representatives are spoken of in the Constitution by particular designation as such. Wherever they are mentioned as constituting the National Legislature they are referred to as the Congress, as we shall presently see. In only a few instances are the two Houses spoken of separately by the use of the same language, and in each instance the context is clear, as follows: "*Each* House shall be the Judge of the Elections, Returns, etc. * * *; a Majority of *each* House shall constitute a Quorum, etc. * * * but a smaller Number may, etc. * * * as *each* House may provide"; "*Each* House may determine the Rules etc."; *Each* House shall keep a Journal, etc. * * *; and the Yeas and Nays of the Members of *either* House on any question * * *; "*Neither* House, during etc. * * * shall, without the Consent of the *other*, adjourn etc. * * *"; "They shall * * * be privileged from Arrest during their Attendance at the Session of *their respective Houses*, * * *; and for any Speech or Debate in *either* House, they shall not, etc."; "he shall return it * * * to *that* House in which it shall have originated, *who* shall enter, etc. * * * on *their* Journal. * * * If after, etc. * * * two thirds of *that* House etc. * * * it shall be sent * * * to the *other* House * * * and if approved by two-thirds of *that* House. * * * But in all cases * * * the Names * * * shall be entered on the Journal of *each House respectively*"; "He (the President) may * * *, convene *both* Houses, or *either* of *them*, and in case of disagreement between *them*, * * * he may adjourn *them*, etc.".

The context leaves no room for doubt in any of these instances.

**(2) The Word "Congress" as Used in the Constitution Means Both Houses of Congress and Never Either House in the Alternative.**

The presence of the word "Congress" in the expression "unless the Congress by their adjournment prevent" is an insuperable barrier to the contention of the respondent that the word "their" may refer to either House in the alternative, if the uniform sense in which the word "Congress" is used in the Constitution is a proper criterion.

Aside from the appearance of the word "Congress" in the clause "unless the Congress by their adjournment prevent", the word "Congress" appears 28 times in the Constitution, as follows: twice in the expression "The Congress shall have power"; twice in "Consent of the Congress"; and once in each of the following expressions: "a Congress of the United States", "the Congress of the United States", "the Session of Congress", "prescribed by Congress", "the Acceptance of Congress", "Consent of Congress", "the Congress may at any time by Law make", "the Congress shall assemble", "prohibited by Congress", "Controul of the Congress", "Senators and Representatives to which the State may be entitled in the Congress", "The Congress may determine", "The Congress may by law provide", "The Congress may by Law vest", "He (the President) shall * * * give to the Congress Information", "the Congress may from time to time ordain", "such Regulations as the Congress shall make", "as the Congress may by Law have directed", "the Congress may by general Laws prescribe"; "admitted by the Congress into the Union", "the Consent * * * of the Congress", "The Congress * * * shall propose Amendments", and "the

* * * mode of Ratification may be proposed by the Congress".

A mere reference to the foregoing expressions is sufficient to make it apparent that the Constitution of 1787 uses the word "Congress", in all of the 28 instances, *as meaning the Senate and House of Representatives which constitute the National Legislature, and never as meaning the one or the other in the alternative.*

Moreover, the word "Congress" is used 16 times in the Amendments to the Constitution, once in each of the following expressions: "Congress shall make no law respecting * * * religion" (1789), "Congress shall have power to enforce this article" (Amendment XIII) (1865), twice in the expression "Representatives in Congress" (1868), once each in the expressions "an oath, as a Member of Congress" (1868), "But Congress may by a vote of two-thirds of each House" (1868), "The Congress shall have power to enforce * * * this article" (XIV Amendment). (1868), "The Congress shall have power to enforce this article * * *" (XV Amendment) (1870), "The Congress shall have power to lay and collect taxes" (1913), "The Congress and the several States shall have concurrent power" (1919), "Submission to the States by the Congress" (1919), "The Congress shall have power to enforce this article" (Amendment XIX) (1919), "The Congress shall assemble at least once in every year" (1933); twice in the expression "The Congress may by law provide" (1932); and once in the expression "the submission thereof (the XXI Amendment) to the States by the Congress" (1933).

It is obvious, from the foregoing instances, that the word "Congress" has the same meaning in the Amendments that it has in the Constitution, and that it has the same meaning in the 20th as in the 18th and 19th centuries. If the word "Congress" in all the other 44 instances so patently refers exclusively to the two branches of the National Legislature,

it is extremely difficult to see any reason for contending that in the only other instance where the word "Congress" is used in the Constitution, namely, in the expression "unless the Congress by their adjournment prevent", it should have a wholly different meaning, especially where the context so clearly indicates a meaning exactly the same as in the other 44 instances.

**(3) The Use of the Singular or the Plural in Referring to a Particular House is Exclusively a Matter of Style.**

Frequently the Constitution refers to a House of Congress in the singular, for example: "Each House shall be the Judge of the Elections, etc. of *its* own Members", "Each House may determine the Rules of *its* Proceedings, punish *its* Members", "Each House shall keep a Journal of *its* Proceedings, etc." And the Constitution just as frequently refers to such House in the plural, for example; "The House of Representatives shall Chuse *their* speaker", "The Vice President * * * shall have no Vote unless *they* be equally divided", "The Senate shall Chuse *their* other Officers", "Each House shall keep a Journal * * * and * * * publish the same, excepting such Parts as may in *their* Judgment, etc.", and in the 20th Amendment, submitted in 1932, the word "them" is applied to the House of Representatives and the Senate separately.

There is no doubt that in all these instances the singular or the plural could be used interchangeably without in any way affecting the sense, and it is apparent that the use of the one or the other is exclusively a matter of style or good usage.

**(4) Where the Plural is Used in Referring to Congress the Two Houses of Congress are Meant and Not the Members of Either House.**

In all the instances in the Constitution where the plural is used in referring to Congress it is believed that the con-

text will demonstrate that reference could not be to the members of either House, or even to the members of both Houses, but to the two Houses themselves as constituting the Congress.

Speaking of the census, the Constitution says: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as *they* shall by Law direct". Here the word "they" could not refer separately to the members of the Senate or the House of Representatives because neither House alone possesses the power to "by Law direct". Could the word "they", in any reasonable sense, be said to refer to the membership of both Houses? We know that the combined membership of the two Houses lacks the power to "by Law direct". Moreover, the Constitution is against such an interpretation. The Constitution speaks of Senators and members of the Senate, and Representatives and members of the House of Representatives, but the Constitution nowhere speaks of members of Congress. The Constitution conceives of the Congress as composed of two separate and independent legislative assemblies, each having its own members, but does not conceive of the combination of the two Houses, which is called Congress, as having members. (See, for example, Art. I, Sec. 5.) Therefore, the only rational conclusion would seem to be that the word "they" refers to the two Houses that compose the Congress, "they" constituting the only body that has the power to "by Law direct".

Again we find the expression "The Congress shall assemble at least once in every year . . . unless *they* shall by law appoint a different day." What does the word "they" refer to? It could not refer to the members of either House separately, because neither House separately possesses the power to "by Law appoint a different day".

It must, therefore, refer either to the members of both Houses or to both Houses, and, for reasons above stated, it would seem clear that the reference is to the two separate legislative assemblies.

Again the Constitution, after providing for the appointment of public officers, says: "but the Congress may by Law vest the appointment of such inferior Officers, as *they* think proper, in the President alone, in the Courts etc."

Here it is equally apparent the word "they" cannot refer to the membership of either House but that it obviously refers to the two Houses that compose the Congress, which alone possesses power to "by Law vest" the appointment etc.

The Constitution provides that the President may "on extraordinary Occasions, convene both Houses, or either of *them*, and in case of Disagreement between *them*, * * *, he may adjourn *them*, etc."

Here, of course, no comment is necessary. The word "them" obviously refers to the two Houses.

The Constitution also speaks of the United States in the plural but the context never leaves any doubt whether reference is to the United States as a whole or to the separate States.

It says: "No title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under *them*, shall, without the Consent of the Congress, accept of any present etc." Here, of course, the word "them" refers to the United States as a whole and not to the States that compose it, much less to the citizens that compose the States.

Again the Constitution says that the President shall receive a compensation during his term of office and that "he shall not receive within that Period any other Emolument from the United States, or any of *them*". Here it is perfectly plain what the meaning is.